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SERIAL NUMBER	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.
08/010,555	01/28/93	SOLAZZI	M CHEMPLEX-3

EXAMINER	
CANO, M	

ART UNIT	PAPER NUMBER
1809	4

18M1/0907

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DATE MAILED: 09/07/93

This is a communication from the examiner in charge of your application.
COMMISSIONER OF PATENTS AND TRADEMARKS

☒ This application has been examined ☑ Responsive to communication filed on 6/24/93 ☑ This action is made final.

A shortened statutory period for response to this action is set to expire 3 month(s), — days from the date of this letter.
Failure to respond within the period for response will cause the application to become abandoned. 35 U.S.C. 133

Part I THE FOLLOWING ATTACHMENT(S) ARE PART OF THIS ACTION:

1. ☐ Notice of References Cited by Examiner, PTO-892.
2. ☐ Notice of Draftsman's Patent Drawing Review, PTO-948.
3. ☐ Notice of Art Cited by Applicant, PTO-1449.
4. ☐ Notice of Informal Patent Application, PTO-152.
5. ☐ Information on How to Effect Drawing Changes, PTO-1474.
6. ☐ _____.

Part II SUMMARY OF ACTION

1. ☑ Claims 1-15, 16-20 are pending in the application.
   Of the above, claims 16-20 are withdrawn from consideration.
2. ☐ Claims _____ have been cancelled.
3. ☐ Claims _____ are allowed.
4. ☑ Claims 1-15 are rejected.
5. ☐ Claims _____ are objected to.
6. ☐ Claims _____ are subject to restriction or election requirement.
7. ☐ This application has been filed with informal drawings under 37 C.F.R. 1.85 which are acceptable for examination purposes.
8. ☐ Formal drawings are required in response to this Office action.
9. ☐ The corrected or substitute drawings have been received on _____. Under 37 C.F.R. 1.84 these drawings are ☐ acceptable; ☐ not acceptable (see explanation or Notice of Draftsman's Patent Drawing Review, PTO-948).
10. ☐ The proposed additional or substitute sheet(s) of drawings, filed on _____. has (have) been ☐ approved by the examiner; ☐ disapproved by the examiner (see explanation).
11. ☐ The proposed drawing correction, filed _____, has been ☐ approved; ☐ disapproved (see explanation).
12. ☐ Acknowledgement is made of the claim for priority under 35 U.S.C. 119. The certified copy has ☐ been received ☐ not been received ☐ been filed in parent application, serial no. _____; filed on _____.
13. ☐ Since this application apppears to be in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under Ex parte Quayle, 1935 C.D. 11; 453 O.G. 213.
14. ☐ Other

EXAMINER'S ACTION

Part III DETAILED ACTION

Election/Restriction

1. Restriction to one of the following inventions is required under 35 U.S.C. 121:

Group I Claims 1-15, drawn to a device for creating a sample receptor for retaining a sample, classified in Class 422, subclass 102.

Group II Claims 16-20, drawn to a method of forming a receptacle used to subject a sample to spectrochemical analysis, classified in Class 436, subclass 174.

The inventions are distinct, each from the other because of the following reasons:

2. Inventions I and II are related as product and process of use. The inventions can be shown to be distinct if either or both of the following can be shown: (1) the process for using the product as claimed can be practiced with another materially different product or (2) the product as claimed can be used in a materially different process of using that product (M.P.E.P. § 806.05(h)). In the instant case the product as claimed can be used in a materially different process of using that product such as culturing pathogenic organisms.

3. Because these inventions are distinct for the reasons given above and have acquired a separate status in the art as shown by their different classification, restriction for examination purposes as indicated is proper.

4. Applicant's election with traverse of Group I, claims 1-15 in Paper No. 3 is acknowledged. The traversal is on the ground(s) that Applicant is not claiming a process for using the sample receptacle, but a method of forming a sample receptacle. This is not found persuasive because as set forth in the preamble of the method the receptacle is formed in order to subject a sample to spectrochemical analysis.

Applicant is claiming just the assembly of the receptacle to be further used in a spectrochemical analysis, and not the manufacture of the receptacle per se.

The requirement is still deemed proper and is therefore made FINAL.

Claim Rejections - 35 USC § 103

5. The following is a quotation of 35 U.S.C. § 103 which forms the basis for all obviousness rejections set forth in this Office action:

> A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.
>
> Subject matter developed by another person, which qualifies as prior art only under subsection (f) or (g) of section 102 of this title, shall not preclude patentability under this section where the subject matter and the claimed invention were, at the time the invention was made, owned by the same person or subject to an obligation of assignment to the same person.

6. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 86 S.Ct. 684, 15 L.Ed. 2nd 545 (1966), 148 USPQ 459, that are applied for establishing a background for determining obviousness under 35 U.S.C. § 103 are summarized as follows:

1. Determining the scope and contents of the prior art;
2. Ascertaining the differences between the prior art and the claims at issue; and
3. Resolving the level of ordinary skill in the pertinent art.

7. Claims 1-15 are rejected under 35 U.S.C. § 103 as being unpatentable over Solazzi.

Solazzi discloses the invention substantially as claimed. Solazzi, U.S. Pat. No. 4,698,210 illustrates in Figs. 1-5 a tubular body (11, 12) having a tapered exterior wall (42) and at least one open end and closed end (14); an annular collar (23), having a tapered inside wall (51) at an angle which is supplemented to the tapered exterior wall of the tubular body, being disposed around the tubular body with an interference fit, whereby the collar engages a sheet of material disposed across the open end of the tubular body being compressed between the exterior wall of the tubular body and the interior wall of the annular collar, covering the peripheral edges of the sheet of material and pulling the sheet taut over the open end; an interlocking means for locking the annular collar at a set position on the tubular body is provided; the tubular body having a predetermined length engaging with the annular collar; the interlocking means including a semicircular groove (43) located on the tapered exterior wall of the tubular body and an inwardly directed semicircular protrusion (50) engaging the semicircular groove when the annular collar and the tubular body are assembled; the tubular body including a continuous peripheral flange (26) located the exterior of the tubular wall, extending above the closed end; the closed end including venting means (25, 40) for maintaining pressure equalization; the tubular body further including a second open end (41) permitting introduction of a sample into the tubular body; the annular collar having first and second ends, the first end including an outwardly directed flange (22) to facilitates alignment of a sample cup; the tubular body and the annular collar formed from polyethylene (see col. 4, lines 16-19). However, Solazzi fails to disclose extension of the peripheral edges of the flexible sheet of material beyond the annular collar.

It would have been an obvious matter of design choice to provide Solazzi with a collar so that the peripheral edges do not extend beyond the collar, since such a modification would have involved a mere change in the size of the collar. A change in size is generally recognized as being within the level of ordinary skill in the art. *In re Rose*, 105 USPQ 237 (CCPA 1955). In this case, a change in length of the collar of Solazzi ('210), being the structure fabricated substantially of plastic would have been obvious to one of ordinary skill in the art, since plastic is recognized as a material which can be molded to any size, shape and length. The modified collar would have solved Applicant's overhang of extraneous film by increasing the length of the collar so that any edges may be covered by the collar, preventing from trimming any excess of flexible material. Such modification being considered to be obvious within the perview of the skilled in the art.

Response to Amendment

8. Applicant's arguments with respect to claim 1 have been considered but are deemed to be moot in view of the new grounds of rejection.

Applicant argues that Solazzi ('210) does not teach away from coverage of the peripheral edges of the sheet of material disposed across the open end of the tubular body.

As set forth in claim 1, "said collar engages said sheet of material disposed across said open end of said tubular body, covering said peripheral edges of said sheet of material and pulling said sheet of material taut over said open end." There is nothing in the claim citing (before amended) coverage of extraneous pieces of material protruding from beyond the annular body. Therefore, Solazzi ('210) illustrates and teaches the above mentioned limitation as claimed.

Applicant argues that Solazzi ('210) does not teach the annular collar disposed around substantially all of the predetermined length of the tubular body.

The answer to this argument may be found in the above obviousness rejection wherein such modification is viewed within the perview of one of ordinary skill in art to solved Applicant's overhanging of peripheral edges.

Conclusion

9. Applicant's amendment necessitated the new grounds of rejection. Accordingly, **THIS ACTION IS MADE FINAL**. See M.P.E.P. § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 C.F.R. § 1.136(a).

A SHORTENED STATUTORY PERIOD FOR RESPONSE TO THIS FINAL ACTION IS SET TO EXPIRE THREE MONTHS FROM THE DATE OF THIS ACTION. IN THE EVENT A FIRST RESPONSE IS FILED WITHIN TWO MONTHS OF THE MAILING DATE OF THIS FINAL ACTION AND THE ADVISORY ACTION IS NOT MAILED UNTIL AFTER THE END OF THE THREE-MONTH SHORTENED STATUTORY PERIOD, THEN THE SHORTENED STATUTORY PERIOD WILL EXPIRE ON THE DATE THE ADVISORY ACTION IS MAILED, AND ANY EXTENSION FEE PURSUANT TO 37 C.F.R. § 1.136(a) WILL BE CALCULATED FROM THE MAILING DATE OF THE ADVISORY ACTION. IN NO EVENT WILL THE STATUTORY PERIOD FOR RESPONSE EXPIRE LATER THAN SIX MONTHS FROM THE DATE OF THIS FINAL ACTION.

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure.

Sultan et al., U.S. Pat. No. 4,982,615 disclose a sterile container for collecting biological samples for purposes of analysis.

Lesage et al., U.S. Pat. No. 4,961,916 disclose a sample device.

Solazzi, U.S. Pat. No. 4,402,909 discloses vials for comminuting and blending samples for spectrochemical analysis.

Libman et al., U.S. Pat. No. 4,046,138 disclose a diagnostic device for liquid samples.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Milton I. Cano whose telephone number is (703) 308-3959.

Any inquiry of a general nature or relating to the status of this application should be directed to the Group receptionist whose telephone number is (703) 308-0196.

Milton I. Cano: mic
September 5, 1993

James C. Housel 9/7/93
JAMES C. HOUSEL
SUPERVISORY PATENT EXAMINER
GROUP 180